Teong Piling Co v Asia Insurance Co Ltd

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 31-609-87
EDGAR JOSEPH JR SCJ
8 DECEMBER 1993

Arbitration *— Award — Construction — Whether costs were awarded on a party and party basis — Arbitration Act 1952 s 19(1)*

Words and Phrases *— 'Costs of this arbitration'*

In an arbitration between the plaintiff and the defendant, the arbitrator's award stated, inter alia, that the plaintiff and defendant should 'pay for the costs of this arbitration, including that of the arbitrator's fees, expenses and disbursements of RM23,740'. The plaintiff applied for its costs of arbitration to be taxed by the senior assistant registrar on a party and party basis. The sole issue for determination concerned a question of construction, namely, whether the expression 'costs of this arbitration' in the arbitration award meant that costs were to be paid on a party and party basis or that the defendant was to pay only the costs of the arbitration and expenses amounting to RM23,740 and no other costs.

Held, allowing the application:

(1) The construction of the order as to costs in the arbitration award was a matter for the court. In construing the words, the court looks at the words of the arbitrator in the award and the appraisal of the award as a whole, the course which the proceedings took and the relevant law.

(2) The words 'costs of this arbitration including that of the arbitrator's fees, expenses and disbursements of RM23,740', read together with the words in the appraisal of award, clearly reveal that the intention to be gathered from the words used was that costs were to be on a party and party basis. Furthermore, the word 'including' is a word of extension, not of restrictive definition, and it was crystal clear that the arbitrator had separated arbitrator's fees and expenses from other costs, all three items being payable by the defendant to the plaintiff.

Per curiam:

(1) The principle of the High Court that 'costs follow the event' or in other words, that the successful party should have his costs, applies to an arbitrator.

(2) The arbitrator was functus officio once his award had been published and had no jurisdiction to give any clarification of the award he had made in the absence of the question being remitted to him by the court.

A **[Bahasa Malaysia summary**

Di dalam satu timbangtara di antara plaintif dan defendan, award penimbangtara telah menyatakan, antara lain, bahawa plaintif dan defendan harus 'membayar kos timbangtara ini, termasuk fee penimbangtara, perbelanjaan dan ganti bayaran sebanyak RM23,740'.
B Plaintif telah memohon supaya kos timbangtaranya ditetapkan oleh penolong kanan pendaftar atas dasar pihak dan pihak. Isu tunggal untuk pertimbangan mahkamah adalah berkenaan dengan satu soalan pentafsiran, yakni, sama ada ungkapan 'kos timbangtara ini' di dalam award timbangtara itu bermakna bahawa kos itu harus dibayar atas
C dasar pihak dan pihak atau bahawa defendan harus membayar cuma kos timbangtara dan perbelanjaan sejumlah RM23,470 dan bukan sebarang kos yang lain.

Diputuskan, membenarkan permohonan itu:

(1) Pentafsiran perintah berkenaan kos di dalam satu award
D timbangtara adalah satu perkara untuk pertimbangan mahkamah. Dalam mentafsirkan perkataan-perkataan itu, mahkamah mengambil perhatian tentang perkataan-perkataan penimbangtara di dalam award itu dan sebab-sebab untuk award itu secara keseluruhan, perjalanan prosiding itu dan undang-undang yang relevan.
E (2) Perkataan-perkataan 'kos timbangtara ini, termasuk fee penimbangtara, perbelanjaan dan ganti bayaran sebanyak RM23,740', dibaca bersama dengan perkataan-perkataan di dalam sebab-sebab untuk award itu, jelasnya menunjukkan bahawa niat yang boleh diperolehi daripada perkataan-perkataan yang
F digunakan itu adalah bahawa kos patut dibayar atas dasar pihak dan pihak. Lagipun, perkataan 'termasuk' adalah satu perkataan lanjutan, tanpa definasi yang tersekat, dan adalah sungguh jelas bahawa penimbangtara telah menceraikan fee penimbangtara dan perbelanjaan daripada kos lain, ketiga-tiga perkara itu kena dibayar oleh defendan kepada plaintif.
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Per curiam:

(1) Prinsip yang terpakai di Mahkamah Tinggi bahawa 'costs follow the event' atau dalam perkataan lain, bahawa pihak yang berjaya harus mendapat kosnya, terpakai kepada seorang penimbangtara.
H (2) Penimbangtara adalah functus officio sebaik sahaja awardnya diterbitkan dan tidak mempunyai bidangkuasa untuk memberi sebarang penjelasan tentang award yang telah dibuatnya tanpa soalan itu dituju balik kepadanya oleh mahkamah.]

Cases referred to

I 1 *Lloyd del Pacifico v Board of Trade (No 2)* (1930) 35 Com Cas 325 (refd)

2 *Stotesbury v Turner* [1943] KB 370 (refd)

3 *Lewis v Haverfordwest Rural District Council* [1953] 2 All ER 1599; [1953] 1 WLR 1486 (refd)
4 *P Rosen & Co Ltd v Dowley and Selby* [1943] 2 All ER 172 (folld)
5 *Societe Anonyme Pecheries Ostendaises v Merchants' Marine Insurance Co* [1928] 1 KB 750 (folld)
6 *R v Kershaw* 26 LJMC 19 (refd)
7 *Savoy Hotel Co v London County Council* [1900] 1 QB 665 (refd)
8 *Hilder v Dexter* [1902] AC 474 (refd)

Legislation referred to
Arbitration Act 1952 s 19(1)
Rules of the High Court 1980 O 59 r 27(2)
Arbitration Act 1950 s 18(1) [GB]

Mahinder Singh Dulku (*Mahinder Singh Dulku, Ismadi & Co*) for the plaintiffs.

Gerard Chan Weng Yew (*Lim Kean Siew & Co*) for the defendant.

Edgar Joseph Jr SCJ: In this application by way of originating summons, the plaintiff, Teong Piling Co, had prayed for an order that their costs arising out of the arbitration in respect of disputes arising out of piling and basement works of a proposed 6-storey bank and office block on three plots of land situated in the North Eastern District of Penang, pursuant to the award of the arbitrator, Mr WY Chin, made and published on 8 September 1986, be taxed by the senior assistant registrar on a party and party basis.

The arbitrator's award ('the award') provided as follows:

> Whereas by an agreement made on the first day of August 1984 between the claimant of the one part and the respondent of the other part, it was agreed that in the event of any dispute or difference arising between the two contracted parties as to certain matters set out in the said agreement, such dispute or difference shall be referred to arbitration for a final decision of a person to be appointed on the request of either party, by the President or Vice-President for the time being of the Pertubuhan Akitek Malaysia (PAM); and
>
> Whereas a dispute or difference having arisen between the parties to the said agreement and at the request of both parties, the president of PAM had successively nominated me to be the arbitrator;
>
> Now, I, the said Chin Wai Yeong, an associate of the Chartered Institute of Arbitrators, London, having accepted the said appointment and having visited the site, heard and considered the allegations, witnesses and evidence of both parties do hereby award and determine as follows:
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> (1) the respondent to pay the claimant the sum of RM379,824.90 within 14 days from the receipt of this award, failing which payment, interest at 8%pa shall be added thereon until the actual receipt of the said payment by the claimant;
> (2) the counterclaim of the respondent brought against the claimant is dismissed hereof; and
> (3) *the respondent and the claimant shall jointly pay for the costs of this arbitration including that of the arbitrator's fees, expenses and disbursements of RM23,740 in the ratio of 7:3 respectively.* (Emphasis added.)

In his 'appraisal of award' under the sub-heading 'Arbitration costs', the arbitrator said this:

> As established, the party predominantly in default was the respondent and logically, they would bear most of *the arbitration costs of this proceeding.* However, the claimant was not absolutely blameless and, in submitting their dispute to this arbitration, they had engaged many expensive expert witnesses in support of their claims. The engagement of these expensive witnesses was outside the jurisdiction and control of the respondent who had been reasonably responsive to the present arbitration in the true spirit that it was intended.
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> In awarding the costs, therefore, it would not be fair for the respondent to wholly shoulder the expensive costs of witnesses of the claimant. In this respect, a ratio of 7:3 in favour of the claimant was considered fair and had accordingly been apportioned.
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> The costs of arbitration would involve the arbitrator's fee, his disbursements on travel, accommodation and expenses, PAM's charges, Mr G Moffatt's fees as well as the fees and expenses for the legal counsel and the witnesses of both parties. (Emphasis added.)

Before me, the sole issue which arose for determination concerned a question of construction; namely, whether the expression 'costs of this arbitration' in para 3 of the award meant that costs were to be paid on a party and party basis, as contended by counsel for the plaintiff, *or* that the whole costs of the arbitration and expenses amounted to RM23,740 and that no other costs were payable by the defendant, as contended by counsel for the defendant.

The expression 'costs of the arbitration', used by the arbitrator in the award is regularly used by arbitrators. So, for example, Ronald Bernstein in his *Handbook of Arbitration Practice* (1st Ed) at p 141 para 20.4.1 says, inter alia, this:

> ... *the more usual course is for the arbitrator merely to award that party P pay to party R his costs (or a fraction of his costs) of the arbitration* (or of a specified stage of the arbitration) *and pay the arbitrator's fees and disbursement (or a fraction of them).* The next stage is for party R to formulate his claim for costs, and to invite party P to agree it. Where solicitors are acting for both parties, they more often than not agree upon the amount. But if they cannot agree, there is a dispute which has to be resolved. In a heavy case the amount in issue as to costs can be substantial. *The process of resolving this dispute is called 'taxation of costs'.* (Emphasis added.)

I note, in passing, that according to 2 *Halsbury's Laws of England* (4th Ed) at p 321 para 608, 'The costs of an arbitration include not only the costs of the preparation of the submission, and of the proceedings before the arbitrator or umpire and the award, but also the costs of the argument of a special case stated for the decision of the court pending the reference.'

It was not disputed, and indeed it was common ground, that the arbitrator has the power to order costs on a party and party basis. Accordingly, the argument before me revolved around the proper interpretation to be assigned to the order as to costs made by the arbitrator in the form that it took in para 3 of the award.

There are certain preliminary observations I should like to make before embarking upon a consideration of the issue which arises for decision.

In the first place, s 19(1) of our Arbitration Act 1952 (Rev 1972) (which is in pari materia with s 18(1) of the United Kingdom Arbitration Act 1950) provides:

> Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

In the present case, I was told by counsel that the arbitration agreement contained no contrary intention within the meaning of s 19(1). Accordingly, the arbitrator had a full discretion in the matter of costs, though in the exercise of such discretion he would have to apply the same principles as would the High Court in like circumstances. (See *Lloyd del Pacifico v Board of Trade (No 2)*;[1] and *Stotesbury v Turner.*[2])

In the second place, the principle of the High Court that 'costs follow the event' or in other words, that the successful party should have his costs, applies to an arbitrator (see *Lewis v Haverfordwest Rural District Council.*[3]) Put bluntly, in the terms of a game, the expression 'costs follow the event' means the loser pays the costs of the winner, including his lawyer's fees, costs and charges. This principle, is, of course, subject to exceptions so that in exceptional circumstances, an arbitrator may, in the exercise of his discretion, deprive a successful party of the whole or, as happened in the present case, part of his own costs. In doing so, I note that the arbitrator did give his reasons, the effect of which was that he considered that there had been extravagance on the part of the plaintiff in the conduct of the hearing; to wit, by the employment of an excessive number of expensive expert witnesses in support of his claim. In my view, the arbitrator was entitled to do so and I need no more than refer to the case of *P Rosen & Co Ltd v Dowley and Selby.*[4]

I must now address the question which arose acutely for decision.

The contention of the plaintiff in this case was, that the expression 'costs of this arbitration' in para 3 of the award means that costs are to be paid on a party and party basis, or in other words '*all* such costs as were necessary and proper for the attainment of justice or for the enforcing or defending the rights of the party whose costs are being taxed'. (See O 59 r 27(2).) Referring to the equivalent English rule in *Societe Anonyme Pecheries Ostendaises v Merchants' Marine Insurance Co Ltd*[5] at p 762, Atkin LJ (as he then was) speaking for the Court of Appeal, said:

> Upon that question it appears to me to be very important to bear in mind that the Taxing Masters have got to apply the words of Order LXV r 27, sub-r 29. That rule is the *guiding rule* in the taxation of costs. It is intended to sum up generally the principles upon which costs are awarded; and I cannot help thinking that if that rule were really rigorously applied by everybody — and by 'rigorously applied' I mean applied in all cases and giving full effect to the width of its language — there would be many fewer complaints by successful litigants than there are at the present moment. It is a rule which is intended to give the successful litigant a *full indemnity* for all costs reasonably incurred by him in

relation to the action. It says in terms that the Taxing Master is to allow 'all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice'. That is the whole principle that the Taxing Master has got to apply.

It is quite obvious that those costs are not limited to costs incurred after the writ has been issued. Costs incurred before action brought are allowed every day...'. (Emphasis added.)

I have already noted that the only point taken by counsel for the defendant was that, upon a proper construction of the order made by the arbitrator in this case, what was intended was that costs should *not* be on a party and party basis; in particular, that the whole costs of the arbitration and expenses was RM23,740 and that no other costs were payable by the defendant.

The construction of the order as to costs in the award is a matter for the court and, in performing that task, the court looks at the words of the arbitrator as they appear in the award and the appraisal of the award as a whole, making those words their own interpreter, the course which the arbitration proceedings took and the relevant law. But nothing else. It was this approach that I had adopted in determining the question which arose for decision in this case.

In my view, applying the above approach, the words 'costs of this arbitration *including* that of the arbitrator's fees, expenses and disbursements of RM23,740' appearing in para 3 of the award, read together with the words appearing under the sub-heading 'Arbitration costs' in the appraisal of award, when tested against the background of this hotly contested and long drawn out dispute, clearly reveal that the *intention to be gathered from the words used by the arbitrator* in para 3 of the award was that costs were to be on a party and party basis within the meaning of Lord Atkin's dictum quoted above.

I might add that the word 'including' appearing in the award — be it noted — is a word of extension, not of restrictive definition (see *R v Kershaw*;[6] per Channell J in *Savoy Hotel Co v London County Council*[7]) a point which counsel for the defendant's submission overlooks. Once this point is recognized, it becomes crystal clear that the arbitrator had separated arbitrator's fees and expenses from other costs, all three items being payable by the defendant to the plaintiff. Reason and Justice also point to the same conclusion.

By way of postlude, I should like to advert to the fact that while this matter was still pending, the solicitors for the defendant had, by letter dated 17 September 1993, addressed to the executive secretary of Pertubuhan Akitek Malaysia (PAM), sought clarification of the arbitrator's order as to costs, without extending a copy thereof to the solicitors for the plaintiff. The solicitors for the plaintiff took strong objection to this. Be that as it may, that letter was passed on to the arbitrator, Mr WY Chin, who, by a letter dated 20 September 1993, addressed to the solicitors for the defendant, gave them a breakdown as to how the sum of RM23,740 referred to in his award as 'arbitrator's fees, expenses and disbursements' was arrived at.

This caused much annoyance to the solicitors for the plaintiff who gave expression to that annoyance by letters which they wrote to the solicitors for defendant, as well as to the arbitrator. These letters have been exhibited in

an affidavit affirmed by Mr Mahinder Singh of counsel for the plaintiff. The gist of counsel's objection was that once proceedings had been instituted in court only the court had power to remit the award to the arbitrator for clarification.

In my view, counsel's objection is well taken and I would add that the arbitrator being functus officio once his award had been published, would have no jurisdiction to give any clarification of the award he had made in the absence of the question being remitted to him by the court.

I therefore have no hesitation in disregarding the entire correspondence I have referred to, including the letter of the arbitrator giving the clarification sought. Quite apart from the functus officio point, I subscribe to the view that often, the worst person to construe words is the person responsible for their drafting. In this context, I am reminded that Lord Halsbury LC, indeed, once abstained from delivering a judgment on account of his responsibility for the Act in question, contenting himself with a warm concurrence with the welcome speeches of his brethren. This is how he put it in *Hilder v Dexter*[8] at p 477:

> ... I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done.

In the result, I could think of no valid reason for departing from the order I had made in chambers in terms of the originating summons and in favour of the plaintiff which I accordingly confirmed. I also made a further order that the defendant do pay the costs of these proceedings to the plaintiff.

Application allowed.

Reported by Siti Zulaiha Abdullah